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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1169

THE MASSMAN CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Massman Construction Company, a Missouri Corporation, through its attorneys, respectfully prays that a writ of certiorari issue to review the judgment (judgment dismissing petitioner's petition entered January 8, 1945, R. 63; order overruling petitioner's motion for new trial entered March 5, 1945, R. 63) of the Court of Claims of the United States in a suit there entitled "The Massman Construction Company, a corporation, v. The United States, No. 45765," and in support of its petition shows:

Opinion Below

The opinion of the Court of Claims No. 45765 (R. 57) which has not been reported, Mr. Justice Littleton dissenting.

Jurisdiction

The judgment of the Court of Claims was entered on January 8, 1945 (R. 63). The jurisdiction of this Court is invoked under Paragraph 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, Title 28, U. S. C., paragraph 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Question Presented

The basis question is whether the petitioner is entitled to recover $88,000 for the use and rental of equipment under a contract with the respondent, which sum was inadvertently and mistakenly omitted from its bid and contract, the work under the contract having been satisfactorily performed, and the respondent having enjoyed the full use of such equipment in the reasonable sum of the amount claimed.

The preliminary question is whether the petitioner is entitled, in equity, to the reformation or rescission of the contract entered into with the respondent requiring the use of valuable equipment because of mutual mistake of fact, or mistake of fact on the part of the petitioner and inequitable conduct on the part of the respondent in its failure to recognize and correct that mistake when it was called to its attention, or, in the alternative, to have rejected the petitioner's bid, as requested shortly after the bids were opened and long prior to the award, such contract having been entered into without the inclusion of the $88,000 under written protest of the petitioner.

The facts as found by the Court below, and about which there has never been any substantial dispute between the parties, have been fully and fairly set forth by the Court as its Special Findings of Fact (R. 43-57), which will hereafter be summarized in our supporting brief.

Statement of the Case

Petitioner, a Missouri corporation, has been engaged in the general contracting business for a great number of years, during the past fifteen of which its work has been confined largely to contracts with the Corps of Engineers, United States Army, aggregating some $60,000,000, all of which have been performed without substantial controversy (R. 43).

In October, 1940, the United States Engineer Office, New Orleans, Louisiana, advertised for bids to be opened at 2:00 P. M., November 7, 1940, for repairing the existing rubble mound east jetty at Calcasieu Pass, Louisiana. The estimated quantities required under the contract were 48,000 tons of riprap stone, 102,000 tons of core stone and 7,000 tons of cover stone. The work involved first the laying of a mat of riprap stone on the bed of and extending into the Gulf of Mexico and building a core of stone on that mat upward to the low-water level and placing the cover stone over the core (R. 43-44).

The petitioner's officers surveyed the requirements of the project, especially with respect to the kind, suitability and availability of equipment to be used, which they discussed, also the rental charges therefor, although the amount thereof was left to the judgment of the estimator, a trusted employee and a man of broad experience in such matters, who was designated to and who did proceed to New Orleans to prepare the estimate and bid (R. 45).

The petitioner's estimator, so designated, arrived in New Orleans on the morning of November 6, 1940, and began the task of gathering data for his estimate and the preparation thereof (R. 46). Because there were several alternates involved, there were several methods of figuring the bid. He worked steadily throughout that day—with only time out for meals—collecting the necessary information, interviewing, and making his calculations. Since a major factor in the cost was the type and amount of equipment, he first calculated the equipment charge on the customary estimate sheet (R. 46), arriving at a total, as therein itemized, of $88,000 for rental and use of tow boats, barges and other equipment (R. 46). On a second estimate sheet he then prepared the labor costs itemized thereon (R. 47) of placing the stone, together with cost of supervision. On a third sheet he prepared the labor costs of unloading and towing, also itemized therein (R. 48).[1]

The estimate sheets were completed at about 1:00 A. M., November 7, and a varied assortment of papers, with the three estimate sheets, were gathered together and placed in a brief case, leaving summarization and preparation of the bid for the morning's work (R. 48). The Court below found that

> "in removing the papers from his brief case, (the estimator) inadvertently failed to remove the sheet upon which he had determined the equipment charge, and prepared the summary for the purpose of his bid on a fourth sheet by using the second and third sheets

[1] It will be seen from the itemization on the second and third sheets that there was no amount even resembling the cost of use and rental of equipment, also at R. 49-50 the two major items of cost entering into the contract were labor and equipment, labor constituting the larger of the two items.

but without including therein any charge for equipment as shown on the first sheet" (R. 48, 49).

His summarization aggregated the proposed bid at $367,800,

"308,000 is made up of salaries, wages, and other expenses as outlined on the second and third sheets,"

the remainder of $59,800 being the "expected profit" (R. 49).

The estimator then prepared and submitted a bid form, bidding the said erroneous figure of $367,800 (R. 49) and although no amount was included therefor, the estimator

"listed the plant to be used on the work as one twenty-ton whirley, one fifteen-ton derrick barge, and for the remainder of the equipment stated generally: 'necessary number of steel barges and towboats and other equipment as required.' " (R. 49.)

"A charge for equipment to be used on this job was one of the elements of cost which should have been included in the preparation of the estimates for the bid," (R. 49-50) and the equipment set forth in the estimate sheet which was prepared by the estimator

"but was not considered by him in preparing the plaintiff's bid, was reasonable and necessary for the prosecution of the proposed project and the proposed charges therefor contemplating the use of its own equipment were reasonable and proper." (R. 50.)

The cost of renting such equipment instead of using its own equipment would have been substantially in excess of the $88,000 used by the estimator on his estimate sheet (R. 50).

The estimator duly filed his bid, together with bond in the amount of $200,000, and shortly thereafter the bids were opened and read in his presence and in the presence

of the other bidders, together with the Government's estimated cost, which were as follows:

Massman Construction Co.	$367,800.00
Estimated Government Cost	453,601.00
Badgett Construction Co.	620,400.00
D. M. Picton & Co., Inc.	798,600.00
W. Horace Williams Co.	935,000.00

(R. 50)

Immediately after the bids were opened, the estimator, noting the wide disparity in the bids read, having become concerned over the correctness of his bid, communicated with his employer in Kansas City and expressed his concern, the employer also expressing concern after having learned of the prevailing bids, and the estimator was instructed to check his figures, which he had already done and which he did thereafter on various occasions prior to actually locating the mistake, but, imbued as he was with the fact that he had calculated the equipment item first, dismissed this as the possible mistake (R. 50-53).

The estimator first met with his employers at their office on November 18, 1940, at which time inquiry was made of him what equipment he intended to use, and upon making a check of the brief case which he had used in New Orleans, he located the missing estimate sheet in a separate compartment of his brief case, which is the missing estimate sheet hereinbefore referred to as showing the estimated equipment cost of $88,000 (R. 52-53). Thereupon, after seeking the advice of counsel, on November 20, 1940, the petitioner notified the United States Engineer Office at New Orleans, Louisiana, of the mistake (which was approximately a month prior to the award hereafter referred to), and enclosed with that notification a copy of the estimate

sheet as prepared, showing the $88,000, requesting that the said amount be added to its bid "before the contract is awarded", or, in the alternative, "that our bid be rejected, and our bid bond released without penalty" (R. 53). Under date of December 18, 1940, the plaintiff was summarily advised that its bid in the amount of $367,800 was accepted, with the following comment:

> "Reference is made to your letter of November 20, 1940, in which you alleged error in your bid under Invitation No. 614-41-125. You are informed that after due consideration your request for permission to change your bid is denied. You are advised that you have the right to file a claim with the District Engineer for submission through channels to the Comptroller General for further consideration. If you desire to exercise your rights further in this regard, it is suggested that you submit your claim promptly. You are further advised that any action that may be taken on a submitted claim will not in any way affect the requirements for normal procedure under the contract." (R. 54.)

and the contract and bond were enclosed with that letter (R. 54).

Although declination was considered, the petitioner decided to enter into the contract, after weighing the dire effect of forfeiture of its bond and the effect upon its relations with its principal customer, The United States Government, and confronted with the mandate contained in the acceptance letter above, and being confident that the filing of a claim, as suggested, would ultimately result in settlement. Accordingly, on or about December 28, 1940, the petitioner executed the contract which it forwarded to the District Engineer with the requisite bond for $200,000, and

with a written protest and letter to the Comptroller General, making claim for the amount in question, such protest reading:

> "This contract and the bond securing its performance are signed by the contractor, The Massman Construction Company, under protest, said contractor hereby reserving all of its rights in the matter and asking for relief on account of error and mistake in its bid due to the inadvertent omission of charge for use and rental of equipment; due notice of which error and omission was given on November 20, 1940, by the contractor to the District Engineer, United States Engineer Office, New Orleans, Louisiana, before acceptance thereof was made." (R. 55)

The contract, with protest, was not fully consummated, according to the terms of the contract, until approved by the Division Engineer, i.e., January 8, 1942. (R. 39 and 55)

The letter to the Comptroller General forwarded with the executed contract and bond, to which was attached the evidence in support of the petitioner's claim for $88,000, stated:

> "WHEREFORE, The Massman Construction Company prays that relief be given it in this matter by allowing it the reasonable rental value of said equipment so inadvertently overlooked in this bid, for the reason that it would be unfair and unjust for the Government to avail itself of the use of same without compensating the contractor therefor." (R. 55)

The petitioner's claim was denied by the Comptroller General, September 9, 1941, and the petitioner filed its petition in the Court below on October 15, 1942. (R. 1)

Specification of Errors to Be Urged

The Court of Claims erred:

1. In that it seemingly applied strict legal principles in its determination and failed to give effect to the equitable

principles governing the reformation and rescission of contracts containing bona fide mistakes.

2. In holding that, although under its own Special Findings of Fact there was an inadvertent mistake in the petitioner's bid by the omission of $88,000 therefrom for use and rental of equipment, the petitioner had knowledge of that mistake at the time it entered into the contract with the respondent, under written protest, and without the inclusion of the said $88,000 therein, it had cured the mistake, therefore there was no mistake in its contract.

3. In its conclusion that the petitioner's contract was not based upon mistake, as a *matter of law*, which is contrary to its Special Findings of Fact when considered in the light of *equitable principles* laid down and followed by this and other Courts in like or similar matters.

4. In deciding that the plaintiff was not entitled to recover, and in dismissing its petition and rendering judgment against the plaintiff for costs.

Reasons for Granting the Writ

We submit that the question presented is of general importance at the present time in view of the vast number of contracts that have been entered into by contractors throughout the United States with the United States in the present emergency; that the Court of Claims has decided an important question of general law and that its decision is untenable and in conflict with the weight of authority and with the decisions of this and other Courts, that the Court of Claims has so far departed from the accepted and usual course of judicial proceedings and principles of equity as to call for an exercise of this Court's power of supervision, and that since there is no other appeal from the action of that Court, failure to grant this writ and to lay down the correct equitable principles governing this and similar

cases to follow in that and other Courts will result in irreparable hardship to this petitioner and perpetuate confusion in the adjudication of such future litigation.

Unless this writ is granted and the judgment of the Court of Claims is reversed, the respondent will have enjoyed the use and benefit of valuable machinery and equipment of the petitioner, and the petitioner will have suffered damages by failure to have received due compensation therefor, which amount, $88,000, was found by the Court below to be a reasonable charge therefor.

Finally, we respectfully submit that in determining whether this writ should be granted, equitable considerations should be applied to the end that "equity will not suffer a wrong to go without a remedy".

In the determination of the issuance of this writ, the petitioner respectfully requests the Court to give due consideration to the fact that the decision of the Court below was by a divided Court, Mr. Justice Littleton dissenting.

Conclusion

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the said judgment and order of the Court of Claims of the United States should be granted.

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